



CITY OF ESCONDIDO
PUBLIC ART MURAL PROGRAM AGREEMENT

This Public Art Mural Program Agreement (“Agreement”) is made and entered into as of this _____ day of _____, 2024 (“Effective Date”), by and among the City of Escondido, a California municipal corporation (“CITY”); Brenda Townsend, “a Sole Proprietor”] (“ARTIST”); and Sharon Dormani, Power of Attorney of the Mousavi Syed & Rita Family Trust dated 08-07-19 (“HOST”). (The CITY, ARTIST, and HOST each may be referred to herein as a “Party” and collectively as the “Parties.”)

WHEREAS, pursuant to Resolution 2021-87, the CITY has established the Public Art Mural Program (“Program”), whereby Program funds may be awarded by the CITY to ARTIST, at the CITY’s sole discretion;

WHEREAS, pursuant to the Program, ARTIST desires to create a Mural (as more specifically defined in this Agreement) at HOST’s real property located at 158 W. Grand Ave., Escondido, CA 92025, as more particularly described in **Exhibit A** of this Agreement, attached hereto and incorporated herein by this reference (“Property”);

WHEREAS, the Program application regarding the Mural was approved by the CITY’s Appearance Committee on May 9, 2022; and

WHEREAS, the Program application regarding the Mural was approved by the CITY’s Public Art Commission on March 13, 2023 (“Approved Application”).

NOW, THEREFORE, in consideration of the mutual covenants, promises, terms, and conditions set forth herein, and the mutual benefits derived therefrom, the Parties hereby agree as follows:

1. **Recitals**. The Recitals set forth above are included herein by reference as part of this Agreement and the Parties agree that said Recitals are essential facts to this Agreement.
2. **Project Documents**. The Approved Application, description of the Mural, digital images, materials list, detailed budget, timeline, letters of support, materials required by an applicable Request for Proposals, plans, drawings, specifications, and all modifications, addenda, and amendments thereto (collectively, “Project Documents”) are incorporated herein by this reference as if fully set forth herein. The Project Documents are complementary, and what is called for by any one shall be as binding as if called for by all. “Mural,” as that term is used in this Agreement, shall mean the work of art designed, created, or produced by ARTIST in accordance with the Project Documents.
3. **Program Funds**. Subject to the terms and conditions of the Program, the CITY will reimburse ARTIST for eligible reimbursement costs in an amount not to exceed the sum of \$21,590. Costs

eligible for reimbursement pursuant to this Agreement include the following: (i) fees incurred by ARTIST for design and completion of the Mural, (ii) materials necessary for completion and installation of the Mural, and (iii) other expenses previously approved by the CITY's Mural Committee and Public Art Commission. ARTIST will not be compensated or reimbursed for any work related to the Mural that do not conform with the Project Documents.

4. Mural Creation, Installation, and Removal.

- a. *Authorization.* HOST authorizes ARTIST to install the Mural at the Property in accordance with the Project Documents.
- b. *Supervision.* The CITY and HOST, jointly and severally, reserve the right to supervise ARTIST's installation of the Mural. ARTIST shall provide HOST and CITY each 10 days' advance written notice of when ARTIST intends to install the Mural. ARTIST may proceed with such installation if the other Parties are not present, unless at least one of the other Parties has notified ARTIST in writing that ARTIST may not proceed unless the CITY, HOST, or both are present.
- c. *Performance.* ARTIST shall faithfully complete the Mural in a proficient manner, to the satisfaction of the CITY, and in accord with the terms of this Agreement and the Project Documents. ARTIST shall be responsible for the professional quality, technical accuracy, timely completion, and coordination of all reports and other information furnished by ARTIST pursuant to this Agreement, except that ARTIST shall not be responsible for the accuracy of information supplied by the CITY. ARTIST understands and acknowledges that if the Mural is not completed by the deadline set forth in the Project Documents, any reimbursement pursuant to Section 3 of this Agreement will be subject to the availability of funding at the time of actual completion of the Mural.
- d. *Removal.* If HOST reasonably determines that the Mural is limiting use of the Property, HOST may provide ARTIST with 60 days' advance written notice that HOST will remove the Mural from the Property at the end of the 60-day notice period ("Removal Notice"). HOST shall also send the CITY a copy of the Removal Notice. Upon ARTIST's receipt of a Removal Notice, HOST and ARTIST shall make reasonable efforts to find another suitable site for the Mural.

5. Intellectual Property and Artist's Rights.

- a. *Copyright.* Subject to the restrictions, rights, and authorizations hereunder, licenses granted to Owner hereunder, and unless otherwise agreed to by the Parties in writing, ARTIST shall retain all applicable rights pursuant to 17 U.S.C. § 106 in all original works of authorship produced under this Agreement. If ARTIST is comprised of two or more individual persons, the individual persons shall be deemed joint authors of the Mural.
- b. *Owner's Intellectual Property License.* ARTIST hereby grants to HOST; to HOST's agents, authorized contractors, and assigns; and to the CITY an unlimited and irrevocable license to do the following with respect to the Mural:
 - (1) *Use, Display, and Implementation.* HOST may use and display the Mural on the Property only. To the extent the Mural involves design elements that are incorporated by ARTIST into the design of the Property, HOST may implement such elements at the Property.
 - (2) *Reproduction and Distribution.* HOST and the CITY may each make, display, and distribute, and authorize the making, display, and distribution of, photographs and other reproductions of the Mural. HOST and the CITY may each use such reproductions for any

HOST-related or CITY-related purpose, including with respect to advertising, educational, and promotional materials, brochures, books, flyers, postcards, prints, broadcasts, film, internet-based, and other multimedia publicity. HOST and the CITY shall ensure that such reproductions are made in a professional and tasteful manner, in their sole and reasonable judgment. HOST and the CITY shall make reasonable efforts to ensure that such reproductions include the following credit line and copyright notice where practicable: "Hummingbird Jubilee" © 2024 by Brenda Townsend." Neither HOST nor the CITY may license or sublicense its rights for any private or commercial purpose. This license granted hereunder does not include the right to sell photographs or reproductions of the Mural or to authorize the sale of such photographs or reproductions.

- c. *Third Party Infringement.* Neither HOST nor the CITY is responsible for any third-party infringement of ARTIST's copyright or for protecting ARTIST's intellectual property rights.
 - d. *Publicity.* HOST and the CITY shall have the right to use ARTIST's name, likeness, and biographical information in connection with the display or reproduction and distribution of the Mural. ARTIST shall be reasonably available to attend any ceremonies related to the Mural at the request of HOST or the CITY.
 - e. *Trademark.* In the event that HOST's or the CITY's use of the Mural creates trademark, service mark, or trade dress rights in connection with the Mural, HOST and the CITY shall have an exclusive and irrevocable right in such trademark, service mark, or trade dress.
 - f. *Resale Royalty.* If HOST sells the Mural as a fixture to the Property, HOST and ARTIST agree that the resale price of the Mural shall be presumed to be less than the funds provided to ARTIST under this Agreement. Thus, HOST has no obligation to pay resale royalties pursuant to California Civil Code section 986 or any other law requiring the payment of resale royalties.
 - g. *Waiver of Artist's Rights.* With respect to the Mural produced under this Agreement, and in consideration of the procedures and remedies specified in this Agreement, ARTIST hereby waives any and all claims, arising at any time and under any circumstances, against HOST and the CITY (including its officers, agents, employees, successors, and assigns), arising under the federal Visual Artists Rights Act (17 U.S.C. §§ 106A and 113(d)); the California Art Preservation Act (Cal. Civ. Code § 987 et seq.); any other local, state, federal, or international laws that convey rights of the same nature as those conveyed under the above-referenced laws; or any other type of moral right protecting the integrity of works of art. Specifically, ARTIST hereby waives any and all such claims against HOST (including its officers, agents, employees, successors, and assigns); any future owners or successors in interest of the Property; and the CITY (including its officers, agents, employees, successors, and assigns) for any alteration of the Mural regardless of whether such alteration is made necessary for HOST to use the Property for its own business purposes. ARTIST hereby represents and warrants that the ARTIST is authorized to sign this waiver.
6. Maintenance and Repairs. ARTIST,, shall be responsible for maintenance and repair of the Mural. HOST and the City agree to notify ARTIST if maintenance or repair of the Mural is required. ARTIST shall not be entitled to any compensation or reimbursement from the CITY for any costs associated with maintenance or repair of the Mural.
 7. Termination. The Parties may mutually terminate this Agreement through a writing signed by all Parties. The CITY may unilaterally terminate this Agreement for any reason upon providing ARTIST with 10 days' advance written notice. ARTIST agrees to cease all work under this Agreement on or before the effective date of any notice of termination. If the CITY terminates this Agreement due to no fault or failure of performance by ARTIST, then ARTIST shall be reimbursed pursuant to

Section 3 of this Agreement for work satisfactorily performed at the time of such termination. In no event shall ARTIST be entitled to receive more than the amount that would be paid to ARTIST for completion of the Mural.

8. Insurance Requirements.

- a. ARTIST shall procure and maintain, at its own cost, during the entire term of this Agreement, insurance against claims for injuries to persons or damages to property that may arise from or in connection with creation of the proposed mural, and the results of such work, by ARTIST, its agents, representatives, employees, or subcontractors. Insurance coverage shall be at least as broad as the following:
 - (1) *Commercial General Liability.* Insurance Services Office (“ISO”) Form CG 00 01 covering Commercial General Liability on an “occurrence” basis, including products and completed operations, property damage, bodily injury, and personal & advertising injury, with limits no less than \$500,000 per occurrence and \$1,000,000 general aggregate.
 - (2) *Workers’ Compensation.* If applicable, Worker’s Compensation as required by the State of California, with Statutory Limits, and Employer’s Liability Insurance with limits of no less than \$1,000,000 per accident for bodily injury or disease.
 - (3) If ARTIST maintains broader coverage and/or higher limits than the minimums otherwise required by this Agreement, the CITY requires and shall be entitled to the broader coverage and/or the higher limits maintained by ARTIST.
- b. Each insurance policy required by this Agreement must be acceptable to the City Attorney and shall meet the following requirements:
 - (1) *Acceptability of Insurers.* Insurance coverage must be provided by an insurer authorized to conduct business in the state of California with a current A.M. Best’s rating of no less than A-:VII, or as approved by the CITY.
 - (2) *Additional Insured Status.* The Commercial General Liability must name the CITY (including its officials, officers, agents, employees, and volunteers) specifically as an additional insured under the policy on a separate endorsement page. The Commercial General Liability additional insured endorsement shall be at least as broad as ISO Form CG 20 10 11 85, or if not available, through the addition of *both* CG 20 10, CG 20 26, CG 20 33, or CG 20 38, *and* CG 20 37 if a later edition is used.
 - (3) *Primary Coverage.* ARTIST’s insurance coverage shall be primary coverage at least as broad as ISO CG 20 01 04 13 with respect to the CITY, its officials, officers, agents, employees, and volunteers. Any insurance or self-insurance maintained by the CITY, its officials, officers, agents, employees, or volunteers shall be in excess of ARTIST’s insurance and shall not contribute with it.
 - (4) *Notice of Cancellation.* Each insurance policy shall provide that coverage shall not be canceled, except with prior written notice to the CITY.
 - (5) *Waiver of Subrogation.* ARTIST hereby grants to the CITY a waiver of any right to subrogation that any insurer of ARTIST may acquire against the CITY by virtue of the payment of any loss under such insurance. ARTIST agrees to obtain any endorsement that may be necessary to affect this waiver of subrogation, but this subsection shall apply regardless of whether or not the CITY has received a waiver of subrogation endorsement from the insurer. Any Workers’ Compensation policy required by this Agreement shall be endorsed with a waiver of subrogation in favor of the CITY for all work performed by the ARTIST, its agents, representatives, employees and subcontractors.
- c. *Verification of Coverage.* At the time ARTIST executes this Agreement, ARTIST shall provide the CITY with original Certificates of Insurance including all required amendatory endorsements (or copies of the applicable policy language effecting the insurance coverage required by this

Agreement), which shall meet all requirements under this Agreement. The CITY reserves the right to require complete, certified copies of all required insurance policies, including endorsements required by this Agreement, at any time.

- d. *Special Risks or Circumstances.* The CITY reserves the right, at any point during the term of this Agreement, to modify the insurance requirements in this Agreement, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.
- e. *No Limitation of Obligations.* The insurance requirements in this Agreement, including the types and limits of insurance coverage ARTIST must maintain, and any approval of such insurance by the CITY, are not intended to and shall not in any manner limit or qualify the liabilities and obligations otherwise assumed by ARTIST pursuant to this Agreement, including but not limited to any provisions in this Agreement concerning indemnification.
- f. *Insurance Fees.* ARTIST may request that the CITY pay costs associated with ARTIST's compliance with this Section 8. The CITY, in its sole discretion, may elect to pay all, a portion of, or none of such costs.
- g. Failure to comply with any of the insurance requirements in this Agreement, including but not limited to a lapse in any required insurance coverage during the term of this Agreement, shall be a material breach of this Agreement. In the event that ARTIST fails to comply with any such insurance requirements in this Agreement, in addition to any other remedies the CITY may have, the CITY may, at its sole option, (i) immediately terminate this Agreement; or (ii) order ARTIST to stop work under this Agreement and/or withhold any payment that becomes due to ARTIST until ARTIST demonstrates compliance with the insurance requirements in this Agreement.

9. Indemnification, Duty to Defend, and Hold Harmless.

- a. ARTIST represents and warrants that the Mural is the sole work of the ARTIST and does not infringe the intellectual property rights of any third parties. ARTIST agrees to indemnify HOST and the CITY against any claims brought against HOST or the CITY alleging that the Mural infringes the intellectual property rights of any third parties.
- b. ARTIST (including ARTIST's agents, employees, and subcontractors, if any) shall indemnify, defend, and hold harmless the CITY, its officials, officers, agents, employees, and volunteers from and against any and all claims, demands, actions, causes of action, proceedings (including but not limited to legal and administrative proceedings of any kind), suits, fines, penalties, judgments, orders, levies, costs, expenses, liabilities, losses, damages, or injuries, in law or equity, including without limitation the payment of all consequential damages and attorney's fees and other related litigation costs and expenses (collectively, "Claims"), of every nature caused by, arising out of, or in connection with ARTIST's creation of the proposed mural or its failure to comply with any of its obligations contained in this Agreement, except where caused by the sole negligence or willful misconduct of the CITY.
- c. HOST (including HOST's agents, employees, and subcontractors, if any) shall indemnify, defend, and hold harmless the CITY, its officials, officers, agents, employees, and volunteers from and against any and all claims, demands, actions, causes of action, proceedings (including but not limited to legal and administrative proceedings of any kind), suits, fines, penalties, judgments, orders, levies, costs, expenses, liabilities, losses, damages, or injuries, in law or equity, including without limitation the payment of all consequential damages and attorney's fees and other related litigation costs and expenses (collectively, "Claims"), of every nature caused by, arising out of, or in connection with ARTIST's creation of the proposed mural or its failure to

comply with any of its obligations contained in this Agreement, except where caused by the sole negligence or willful misconduct of the CITY.

d. All terms and provisions within this Section 9 shall survive the termination of this Agreement.

10. Attorney's Fees and Costs. In any action to enforce the terms and conditions of this Agreement, the prevailing Party shall be entitled to reasonable attorney's fees and costs.
11. Independent Contractor. ARTIST is an independent contractor, and no agency or employment relationship is created by the execution of this Agreement.
12. Amendment. This Agreement shall not be amended except in a writing signed by all Parties.
13. Merger Clause. This Agreement, together with its attachments or other documents described or incorporated herein, if any, constitutes the entire agreement and understanding of the Parties concerning the subject of this Agreement and supersedes and replaces all prior negotiations, understandings, or proposed agreements, written or oral, except as otherwise provided herein. In the event of any conflict between the provisions of this Agreement and any of its attachments or related documents, if any, the provisions of this Agreement shall prevail.
14. Anti-Waiver Clause. None of the provisions of this Agreement shall be waived by the CITY because of previous failure to insist upon strict performance, nor shall any provision be waived because any other provision has been waived by the CITY, in whole or in part.
15. Severability. This Agreement shall be performed and shall be enforceable to the full extent allowed by applicable law, and the illegality, invalidity, waiver, or unenforceability of any provision of this Agreement shall not affect the legality, validity, applicability, or enforceability of the remaining provisions of this Agreement.
16. Governing Law. This Agreement and all rights and obligations arising out of it shall be construed in accordance with the laws of the State of California. Venue for any action arising from this Agreement shall be conducted only in the state or federal courts of San Diego County, California.
17. Counterparts. This Agreement may be executed on separate counterparts, each of which shall be an original and all of which taken together shall constitute one and the same instrument. Delivery of an executed signature page of this Agreement by electronic means, including an attachment to an email, shall be effective as delivery of an executed original. The Agreement on file with the City is the copy of the Agreement that shall take precedence if any differences exist between or among copies or counterparts of the Agreement.
18. Provisions Cumulative. The foregoing provisions are cumulative to, in addition to, and not in limitation of any other rights or remedies available to the CITY.
19. Notice. Any statements, communications, or notices to be provided pursuant to this Agreement shall be sent to the attention of the persons indicated herein, and each Party shall promptly provide the other Parties with notice of any changes to such contact information.
20. Business License. ARTIST shall obtain a City of Escondido Business License prior to execution of this Agreement and shall maintain such Business License throughout the term of this Agreement.
21. Compliance with Laws, Permits, and Licenses. ARTIST and HOST shall each keep itself informed of and comply with all applicable federal, state, and local laws, statutes, codes, ordinances, regulations, rules, and other legal requirements in effect during the term of this Agreement. ARTIST shall obtain any and all permits, licenses, and other authorizations necessary to complete the proposed mural. Neither the CITY, nor any elected or appointed boards, officers, officials,

employees, or agents of the CITY, shall be liable, at law or in equity, as a result of any failure of ARTIST or HOST to comply with this section.

- 22. Advice of Counsel. The Parties hereby acknowledge that they have executed this Agreement after having the opportunity to consult with, and receive the advice of, their own legal counsel.
- 23. Effective Date. Unless a different date is provided in this Agreement, the effective date of this Agreement shall be the latest date of execution set forth by the names of the signatories below.

(SIGNATURE PAGE FOLLOWS)

IN WITNESS WHEREOF, this Agreement is executed by the Parties or their duly authorized representatives as of the Effective Date:

CITY OF ESCONDIDO

Date: _____

Dane White, Mayor

Brenda Townsend

Date: _____

Signature

Name & Title (please print)

Sharon Dormani

Date: _____

Signature

Name & Title (please print)

APPROVED AS TO FORM:
OFFICE OF THE CITY ATTORNEY
MICHAEL R. MCGUINNESS, CITY ATTORNEY

BY: _____

THE CITY OF ESCONDIDO DOES NOT DISCRIMINATE AGAINST QUALIFIED PERSONS WITH DISABILITIES.

ATTACHMENT “A”

A. General

Brenda Townsend, a sole proprietor (“Artist”) will create and install a work of art (“Mural”) at certain real property, as more particularly described in Section B, owned by the Mousavi Syed & Rita Family Trust dated 08-07-19 (“Host”) pursuant to the City of Escondido’s (“City”) Public Art Mural Program (the “Program”).

B. Property

Artist will install the Mural at 158 W. Grand Ave., Escondido, CA 92025. The Mural will be 14’ by 100’ in size and will be painted directly on the west facing wall along Maple Street Plaza.

C. Program Fund Payment Terms

Program funds provided to Artist pursuant to the Agreement shall not exceed **\$21,590** and will be based on the actual cost of Mural creation. Artist may be paid Program funds at the completion of the mural or in one-third increments during Mural creation and installation. In order to receive reimbursement and ensure accurate calculation of Program funds, Artists must submit original invoices and proof of payment for Mural materials and costs to the City within 30 days of incurrence.

All Mural creation work must be completed within the time period specified in the Agreement (“Completion Deadline”). If the Mural is not completed by the Completion Deadline, Artist understands and acknowledges that reimbursement via Program funds will be subject to funding availability at the time of actual completion of the Mural.

Costs eligible for reimbursement via Program funds pursuant to the Agreement may include:

- Artist fees for design and execution of mural, including artist’s transportation and liability insurance fees. Artists may charge a flat rate per square foot of the mural. Artists may account for assistant fees;
- Materials associated with creating and installing the mural (e.g., paints, panels, fencing, lighting and electrical equipment); and
- Other expenses pre-approved by the Mural Committee or Public Art Commission.

D. Final Inspection

Within 14 days of mural completion, the Artist shall submit high quality “after photos” to the Mural Committee or Program liaison. A final inspection of the mural will be conducted to confirm completion and conformance with previously City-approved plans and specifications. If the mural is to the satisfaction of the Program liaison and Mural Committee, the Artist will receive reimbursement in the appropriate amount within 30 days of the final inspection. Any portions of the mural that do not conform with previously City-approved plans and specifications, will not be reimbursed.

E. Term

The term of the Agreement shall be for five years, commencing on the Effective Date of the Agreement. Host agrees to maintain the Mural on the Property for a minimum of **five years** from the date that installation is completed.

F. Permits and Licenses

Escondido Business License